Supreme Court, U.S.
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No. 02-1096

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

ESTATE OF TOMMY SMITH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of the Commonwealth of Kentucky

SUPPLEMENT TO BRIEF IN OPPOSITION

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I. INTRODUCTION

This Court's recent decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 537 U.S. __, 2003 WL 1792106 (April 11, 2003), prompts this supplemental brief because it seems that *Campbell* might have some relevance to the instant case. As explained below, however, that apparent relevance evaporates when the differences between that case and this one are explored. Although *Campbell is* obviously important in its own right, it breaks no new ground but merely reiterates and applies the Court's decision in *BMW of N.A., Inc. v. Gore*, 517 U.S. 559 (1996). Indeed, as the Court explained, "[u]nder the principles outlined" in *BMW*, *Campbell* "was neither close nor difficult." *Campbell*, slip op. at 8. As such, *Campbell* provides no basis for plenary review of the Kentucky Supreme Court's decision in this case. Furthermore, because, as explained in Respondents' Brief in Opposition, the court below provided the "[e]xacting appellate review" required by *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and carefully applied *BMW*'s three-part test for excessiveness, *Campbell* provides no "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)(per curiam). Thus, a GVR order for reconsideration in light of *Campbell* is unnecessary and inappropriate. *Id.*

II. NEITHER PLENARY REVIEW NOR A GVR ORDER IS APPROPRIATE BECAUSE THE COURT BELOW PROPERLY APPLIED *BMW*'S FIRST, "REPREHENSIBILITY" GUIDEPOST

BMW instructed lower "courts to determine the reprehensibility of a defendant's conduct by considering" five factors: whether [1] "the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or

was an isolated incident; [5] and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S. at 576-77. As discussed in Respondents' Opp. Cert. at 17-23, the punitive damages awarded by the jury and reinstated, after remission, by the court below, were warranted, as Ford's conduct implicated each of these aggravating factors. *See* opinion below in Ford's Appendix at 16a-17a.

First, the "harm" inflicted by Ford on Tommy Smith—death—was not only "physical" but violent, painful, complete, and irreversible, 17a. The economic losses inflicted on by Mr. Smith's surviving spouse and young daughter were similarly grave: the "total loss of his power to labor and earn money." *Id.* These severe physical and financial injuries were far greater than the $4,000 loss occasioned by the bad paint job at issue in *BMW*, and the "minor economic injuries" at issue in *Campbell*. *Campbell*, slip op. at 16. *See* Cert. Opp. at 24.

Second, the jury specifically found, 72a, and the court below confirmed, that Ford's misconduct was not merely "tortious" (in designing a product that was dangerously defective), but "flagrant[ly] indifferent," 14a, and "intentionally malicious," 72a inasmuch as Ford "continued producing and installing such transmissions" long after it knew that they were dangerously defective, and thus "evinced an indifference to or a reckless disregard of the health or safety of others." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S. at 576-77.[1]

Third, despite the fact that the "financial vulnerability," *Campbell*, slip op. at 8, citing *BMW*, 517 U.S., at 576-577,

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[1] "There is no doubt that for at least seven years after Ford knew of the dangerous propensities of the C-6 transmission, it continued producing and installing it in its vehicles . . . . [B]y Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous." 17a.

of Mr. Smith and his family was neither a matter of contention at trial nor a factor explicitly considered by the jury and by the courts below, undoubtedly they were financially vulnerable and powerless, both in absolute terms, *see* 32a (Mr."Smith's wages and hours . . . would have produced a gross income of $22,327.76 per year"), and comparative ones.[2]

Fourth, Ford's own witnesses revealed that Ford's malicious and intentional "[mis]conduct involved repeated actions"—specifically, repeated decisions not to redesign the C-6 transmission, not to recall and retrofit improvements to existing C-6 transmissions, or not warn to foreseeable users about C-6 related hazards—rather than being an unusual or "an isolated incident." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S., at 576-577.[3]

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[2] Far from being without a "strong local presence," and thus potentially subject to jury bias against out-of-state corporations, *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994), Ford is not only the second largest domestic automaker in the country, but, with 10,900 workers in Kentucky, Ford is also the largest private employer and the largest automaker in the state. www.thinkkentucky.com/kyedc/pdfs/KYProfile.pdf. Kentucky is particularly dependent on and thus hospitable to the auto industry, which has "announced or located" "over 300 auto-related plants . . . in Kentucky since 1986, making Kentucky fourth in total automotive . . . production" in the U.S. *Id.* at 2. Similarly, 5.7% of "Kentucky's workforce is employed in an automotive-related industry." www.edc.state.ky.us/kyedc/pdfs/KY_Auto_Industry.pdf. Nor are Kentuckians generally hostile to business or out-of-state corporations. Thus, "Kentucky is currently ranked second in the U.S. for overall success in attracting new and expanding industries for the period from 1999-2001," ThinkKentucky.com, ANNUAL REPORT: 2001, at 9 *at* www.edc.state.ky.us/kyedc/annual_reports/2001_annual_report.pdf, and "23 of the 'Fortune 25'" largest U.S. corporations have manufacturing or service facilities in Kentucky." ThinkKentucky.com, KENTUCKY'S BUSINESS CLIMATE, at 1, *at* www.thinkkentucky.com/kyedc/pdfs/kybc.pdf.

[3] Thus, Ford's own witnesses confessed, and memos from Ford's Principal Engineer for Safety Systems and other Ford employees corroborated, that hundreds of people had been killed, and thousands

Finally, pursuant to the applicable Kentucky punitive damages statute, the jury was explicitly instructed, RA28—and, by special interrogatories, expressly found, 72a—that Mr. Smith's death "was the result of intentional malice" rather than a "mere accident." *Campbell*, slip op. at 8, citing *BMW*, 517 U.S. at 576-77. The court below, pursuant to *Cooper*, independently evaluated the evidence and reached the same conclusion. 14a.

In light of these factors, the court below concluded that Ford's willful decisions to continue to market a product it "knew" not only had "dangerous propensities" but a deadly track record was "substantial[ly]" "reprehensib[le]."17a. This conclusion is consistent with *Campbell*'s guidance regarding the cumulative effect of the aggravating factors identified in *BMW*. 517 U.S. at 576. Thus, while "[t]he existence of any one of these [five] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect," *Campbell*, slip op. at 8, the converse also is true: the existence of *all five factors* certainly tips the scales in favor of the finding of the jury and the decision by the court below that Ford's misconduct was thoroughly reprehensible and opprobrious.

A. Ford Was Not Punished for the Extraterritorial Effects of Its Misconduct or for Dissimilar Acts

Significantly, unlike the Utah Supreme Court, the court below did not attempt to enhance the reprehensibility of Ford's intentional and malicious misconduct—or increase the amount of punitive damages—by highlighting the extraterritorial effects of Ford's post-design misconduct, or by focusing on "dissimilar acts" of unlawful conduct.

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more injured, in tens of thousands of C-6 related accidents that were well-known to Ford more than five years before Ford built the truck that killed Tommy Smith. Cert. Opp. at 7-8 & nn.4-6 (quoting Ford's witnesses, RA4-7, and Ford's internal memos, RA14-19). *See* also 17a.

Campbell, slip op. at 10-12. *See* Opp. Cert. at 6-10. Nor did the Kentucky Supreme Court use this case "as a platform to expose, and punish, the perceived deficiencies" of Ford's "operations throughout the country." *Campbell*, slip op. at 9. Indeed, that court never mentioned Ford's nationwide practices regarding C-6 equipped vehicles or any other Ford product or the effects any such practices might have had outside Kentucky. *See* Opp. Cert. at 6-10.[4]

Because the court below carefully followed the *BMW* approach that this Court reiterated in *Campbell* and because nothing in *Campbell* would give the court below any reason to doubt either its method or its conclusion about the reprehensibility of Ford's conduct, the decision in *Campbell* would have no bearing on the Kentucky Supreme Court's deliberations if this case was remanded for reconsideration in light of *Campbell*. Consequently, *Campbell* should have no bearing on this Court's decision to grant certiorari or to issue a GVR order.

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[4] The Respondents' evidence and arguments also differed significantly from their counterparts in *Campbell*. From "their opening statements onward, the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities," *Campbell*, slip op. at 10, maintained that "position . . . throughout the litigation," *id.*, and presented more than half a dozen witnesses and scores of documents as part of their affirmative case in support of punishment of extraterritorial conduct or dissimilar acts. Cert. Opp. at 6-8 & n.3 (citing State Farm's Merits Brief in *Campbell*). In this case, by contrast, the Respondents did not introduce any evidence regarding the extraterritorial effects of Ford's misconduct or any dissimilar acts and did not ask the jury to award any punitive damages on those grounds. *See* Cert. Opp. at 5-12. Indeed, what scant evidence was presented to the jury on the number of nationwide accidents, injuries, and deaths caused by C-6 transmissions—amounting to less than two minutes of testimony over a three-and-a-half-week-long trial—was introduced, invited, or provoked by Ford after the close of the plaintiffs' case and after the trial court had warned Ford about the dangers of "opening the door" to such evidence. Cert. Opp. at 7-11 & n. 4-7.

III. NEITHER PLENARY REVIEW NOR A GVR ORDER IS APPROPRIATE BECAUSE THE COURT BELOW PROPERLY APPLIED *BMW*'S SECOND, "RATIO" GUIDEPOST

While *Campbell* underscored this Court's long-standing reluctance to limn a "bright-line ratio which a punitive damages ratio cannot exceed," *Campbell*, slip op. at 14, it also suggested that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process," *id.*, and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of . . . due process." *Id.* at 15.

These observations, while succinct, do not overrule or depart from the precedents of this Court that guided the court below. Indeed, as the Court stressed, these suggestions—which do not rise to the level of constitutional commands—are simply restatements of "our jurisprudence." *Campbell*, slip op. at 14. That fact, combined with three others discussed below make plenary review unnecessary and a GVR unwarranted inasmuch as it is highly unlikely that the court below would alter its assessment of Ford's culpability or further remit the punitive damages award in this case.

First, the five-to-one ratio in this case is obviously in single-digit range. Second, the nation's leading law and economics scholars agree that in awarding compensatory damages in wrongful death cases juries and courts invariably fail to fully estimate (and thus fully compensate for) the value of the decedent's life to himself (and not just his or her survivors), which therefore causes "systematic undeterrence" of dangerous or malicious conduct.[5] Finally,

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[5] The level of compensatory damages awards in personal injury cases is often "too low in practice to accomplish proper deterrence." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 941 (1998). This is particularly so in

unlike the situation in *Campbell*, where *none* of the five aggravating factors previously identified by the Court was present, in this case *all five* were implicated. *See* Section II, *supra*. Thus, where, as in this case, the conduct that gives rise to liabilty for punitive damages is as reprehensible as Ford's was, a ratio higher than 1:1 is perfectly appropriate and certainly would be considered so by the court below. For these reasons, neither plenary review nor an order for a GVR is warranted.

IV. NEITHER PLENARY REVIEW NOR A GVR ORDER IS APPROPRIATE BECAUSE THE COURT BELOW PROPERLY APPLIED *BMW*'S THIRD, "COMPARABLE PENALTIES" GUIDEPOST

In *Campbell*, this Court did not "dwell long" on *BMW*'s third, "civil penalties authorized or imposed" guidepost, *Campbell*, slip op. at 18, citing 517 U.S. at 575, and *Campbell*'s abbreviated discussion of that factor provides scant reason for the Court to grant certiorari or to order a GVR in this case. Indeed, the analyses undertaken by the Utah and Kentucky Supreme Courts of this guidepost are so divergent that *Campbell*'s condemnation of the former's flawed conceivable-criminal-penalties approach can hardly be a basis for overturning the comparable-punitive-awards

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wrongful death cases. *Id.* 111 Harv. L. Rev. at 941-42 & n.229. As Judge Posner and Prof. Landes explain: "The limitation of damages [in wrongful death cases] to survivors' pecuniary loss is very peculiar. It implicitly assumes--if, as we generally believe to be the case, tort law seeks to internalize the costs of accidents--that the average person derives no utility from living. He does not work for himself, he works solely for his family. This cannot be right, and it results in a systematic underestimation of damages in wrongful-death cases." WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987). *See* also David Haddock, Fred McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Cal. L. Rev. 1, 4 & n.10 (1990); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133, 142-43 (1982).

method proposed by Ford, Opp. Cert. at 27-28, and used by the court below. *See* 18a-20a.

V. THE BRIEFS FILED BY FORD'S *AMICI* PROVIDE NO INDEPENDENT GROUNDS FOR PLENARY REVIEW OR A GVR ORDER AS THEY ARE PREDICTED ON "FACTS" CONTRADICTED BY THE EVIDENCE IN THIS CASE, AND RAISE ISSUES NEITHER IMPLICATED BY THIS CASE NOR RULED ON BY THE COURT BELOW

Ford's *amici* obviously view this case as an opportunity to advance pet theories about what this Court must do about the ostensibly disastrous state of punitive damages law, especially in the supposedly unique contexts of personal injury and products liability cases. Regardless of the merits of *amici*'s diverse recommendations—all of which are predicated on the notion that the Fourteenth Amendment's Due Process Clause authorizes this Court both to federalize a traditional province of state law and to strip state juries and state courts of their historic right to evaluate punitive liability and punitive damages on a case-by-case basis—*amici*'s arguments should have no bearing on this Court's decision on whether to grant certiorari or order a GVR in this case. The reason is simple: *amici*'s briefs are predicated on "facts" contradicted the findings of the jury and the courts below, and raise issues neither implicated by this case nor ruled on by the court below.

The irrelevance of these briefs to the questions actually presented by this case is exemplified by the fact that every single *amicus* brief is based on the alleged facts that: (1) Ford's C-6 design met written industry standards; (2) that design also satisfied federal safety standards and regulations; (3) all automakers used the same design; (4) NHTSA gave Ford a clean bill of health; (5) most juries did the same; (6) Ford did not act with malicious intent; and (7) Respondents asked the jury to punish Ford on behalf of all

the people killed by C-6 equipped vehicles.[6] As demonstrated in detail, however, in Respondents' Opp. Cert., the evidence demonstrated that: (1) there were no relevant "industry standards," only an irrelevant industry "recommendation" on uniform transmission patterns; Opp. Cert. at 20 and RA20-21; (2) there were no relevant governmental safety or design standards or regulations, *id.*; (3) while all contemporary transmission designs may have shared some common features, the C-6 design was sufficiently different from the transmissions designed by other automakers (and, indeed, sufficiently different from other Ford-designed transmissions), that C-6 transmissions caused a disproportionately higher rate of accidents, injuries, and deaths, *id., see Center for Auto Safety (CFAS) v. Lewis*, 685 F.2d 656, 660 (D.C. Cir. 1982); (4) NHTSA's investigation:

> *had been terminated without a final determination on the existence of a defect*, when NHTSA and Ford entered a settlement agreement that required Ford to notify owners about the possibility of a defect. Under the settlement agreement, however, *NHTSA explicitly reserved the right to commence a new proceeding on the alleged defect if additional facts warranted such action.*

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[6] *See, e.g.*, Brief *Amici Curiae* of the Alliance of Auto. Mfrs., at 8 ("Due process should foreclose punishment" because Ford "complie[d] with an on-point federal standard."); Brief *Amici Curiae* of Twenty Leading Non-Auto Cos., at 3 ("Ford complied with applicable regulations and industry standards"), *see id.* at 7; Brief *Amici Curiae* of Nat'l Ass'n of Ind. Insurers, at 3 (Ford's compliance with "government regulations or industry standards" established "reasonable disagreement" that should bar punitive damages); Brief *Amici Curiae* of the Prod. Liab. Adv. Council, at 7, 12 (discussing NHTSA and "numerous other juries"), at 13 (asserting Ford "did not act with malicious intent"); at 17 (asserting Respondents "prevail[ed] upon the jury to punish [Ford] on behalf of all 200 people who plaintiff alleged were killed as a result of Ford's design choice.").

CFAS v. Dole, 828 F.2d 799, 802 (D.C. Cir. 1987) (emphases added), (vacated on other grnds, *CFAS v. Dole*, 846 F.2d 1532 (D.C.Cir. 1988)), citing *CFAS v. Lewis,* 685 F.2d at 661 n.5;[7] (5) the unknown number of cases in which juries found that C-6s were not defective is factually suspect (tellingly, Ford has never revealed how many verdicts were actually involved) and legally irrelevant. Cert. Opp. at 19 & n.12; (6) the jury found that Ford's misconduct was intentionally malicious, 72a, and that finding has become final and binding; and (7) Respondents did not ask the jury to assess punitive damages on the basis of the more than 200 people killed in C-6 related accidents.

Because the arguments and proposals of Ford's *amici* are based on false and irrelevant premises and raise issues neither raised in nor ventilated by the court below, those briefs should have no weight in evaluating whether this Court should grant plenary review or order a GVR.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Respondent's Brief in Opposition, this Court should deny the petition for a writ of certiorari and decline to order a GVR.

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[7] NHTSA chose to settle its case against Ford because Ford agreed to warn to all C-6 owners and because NHTSA otherwise "would have faced great difficulties in sustaining its burden to prove the existence of a defect, because the interaction between driver and vehicle seemed a critical factor in the transmission malfunctions. Even if the Department ultimately prevailed, the enforcement action would probably have lasted at least four years during which time approximately six million of the vehicles in question would have been retired from service. Third, the Ford investigation involved an enormous drain on Department resources. At the time of settlement six of the thirty-two ODI [Office of Defects Investigation] staff engineers were working full time on the Ford case; an additional ten engineers were devoting over thirty percent of their time; and 'ODI personnel resources were so overtaxed that the conduct of additional safety defects investigations was impaired.'" 685 F.2d at 663.

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